Golden Gate University Law Review

Volume 11
Issue 1 *Ninth Circuit Survey*

Article 9

January 1981

Federal Practice and Procedure

Bartholomew Lee

Judith A. Leichtnam

FEDERAL PRACTICE AND PROCEDURE

I. *SYMBOLIC CONTROL INC. V. IBM*: ELIMINATING AFFIRMATIVE DEFENSES IN ANTITRUST TREBLE DAMAGE ACTIONS

Bartholomew Lee*

A. INTRODUCTION

Symbolic Control Inc. v. International Business Machines Corp.[1] is necessarily a tilting at windmills story. *Anybody v. IBM* is a tilting at windmills story, and the antitrust enterprise, from a private plaintiff's view (or that of its counsel) is a fairly quixotic endeavor. The chances of a recovery are small, the journey to treble damages is hard and long, often illusory, and full of traps, pitfalls, detours and wrong ways, not to mention rich and powerful adversaries. Nevertheless, once in a while the national policy of the antitrust laws, furthering competitive markets, is effected by a private recovery, and once in a while such an award survives appeal. Symbolic Control has not yet made it, but this term's opinion by the Ninth Circuit, which reaffirms an important policy principle in private antitrust law, will help significantly.

Symbolic faced an affirmative defense upon which IBM prevailed at trial as a matter of law. The Ninth Circuit reversed,

---

* Member of the Bar of the State of California; B.A. St. John's College, 1968; J.D. University of Chicago Law School, 1971. This Note owes much to the creative and analytic thought of the senior litigator for plaintiff in *Symbolic Control Inc. v. International Business Machs.*, John H. Boone, Esq., of San Francisco, to whom the author is grateful for both his conceptual clarity and encouragement over the years, and also for the privilege of second-chairing the trial in *Symbolic Control* with him.

1. [1980] Trade Cas. (CCH) ¶ 63,427 (9th Cir. July, 1980) (per Browning, J.; the other panel members were Kennedy, J., and Dumbauld, D.J., sitting by designation), *amended,* Nov. 19, 1980, *rehearing denied,* Nov. 24, 1980, *rev'g,* [1976] Trade Cas. ¶ 60,723 (N.D. Cal. 1975) (per Zirpoli, J.) (While the Ninth Circuit Survey was at the printer, *Symbolic Control Inc. v. International Business Machines Corp.* was published in 643 F.2d 1339 (9th Cir. 1980)).

denying the affirmative defense as a matter of law, and remanded for a new trial. The reversal has significance not only to understanding the proper role of affirmative defenses in private treble damage actions, but also for the antitrust bar, Congress, and the courts in the continuing struggle with the so-called "passing-on" defense, which most recently manifested itself in *Illinois Brick v. Illinois*[2] and a series of proposed bills in Congress to overrule it.[3]

If to seek private redress for antitrust injury is indeed a quixotic quest, and treble damages in reality all too often turn to be the same sort of mirage that so often bedeviled Don Quixote, the private plaintiffs' bar, like Don Quixote, nonetheless continues to ride on to new adventures. One purpose of this Note is to make that ride a little easier, and the goal a little more sure, by suggesting a general principle inhering in several leading cases, and illustrated by *Symbolic Control,* namely: Affirmative defenses have no place in private treble damage actions, by reason of the national policy in favor of effective enforcement of the antitrust laws. In *Symbolic Control,* the Ninth Circuit held that an affirmative defense analogous to assumption of risk (namely, that injury from "ante-natal" violations, pre-dating the business existence of the plaintiff, escapes private redress) provides no bar to the private plaintiff's recovery. So, too, have other affirmative defenses been read out of the antitrust laws, and so too should they all be. Moreover, application of this principle incidentally solves the symmetry dilemma[4] that so troubled the Supreme Court in *Illinois Brick,* and denial of the "passing-on"

---

2. 431 U.S. 720 (1977); *see generally* P. AREEDA & D. TURNER, ANTITRUST LAW, § 337(a)-(g) (2d ed. 1978); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick,* 46 U. CHIC. L. REV. 602 (1979).

3. *E.g.,* H.R. 8359 & 8516-17, 95th Cong., 2d Sess. (1977); H.R. 2060 (the Rodino bill), 2204 (the McClory bill), & Representative Butler's unnumbered civil penalty draft bill, 96th Cong., 2d Sess. (1979); S. 1874, 95th Cong., 2d Sess. (1977); S. 300, 96th Cong., 1st Sess. (1978); *see also* Note, *Treble Damages and the Indirect Purchaser Problem: Considerations for Congressional Overturning of Illinois Brick,* 39 OH. ST. L. J. 545 (1978).

4. The Supreme Court in *Illinois Brick* stated, "we conclude that whatever rule is adopted regarding pass-on in antitrust damage actions, it must apply equally to plaintiffs and defendants . . . ." 431 U.S. at 728. This Note respectfully suggests that this conclusion of the Court was exactly wrong by reason of the Court's consistent policy stance over the years in favor of recovery against antitrust violators to further the competitive goals of the antitrust laws.

defense to promote recoveries need not require any symmetrical limit of privity to deny recoveries to other plaintiffs.

An Historical Excursus

The antitrust plaintiff's bar need not lose heart that their endeavor is so quixotic, because Don Quixote de la Mancha himself was the first trust buster. Shortly after joisting the windmills, the good Don came upon an army of knights with whom he did battle (to Sancho Panza's horror because all *he* could see was a vast flock of migrating sheep).[5] All the sheep in Spain, however — between two and seven million of them — belonged to one giant wool monopoly, the Mesta,[6] which annually migrated them North to South. The Mesta abused its monopoly powers and privileges, riding roughshod over farmers' lands and through town squares, and one of its herds, on the Eastern sheep route known as the "highway 'de la Mancha,' " was a suitable adversary for trust busting, albeit somewhat muddled, in the fashion of the knight Don Quixote. (He killed seven sheep when all was said and done.) Perhaps the present day antitrust plaintiffs' bar simply has Mestas of its own to contend with, IBM for example, one hopes somewhat more effectively than did Don Quixote.

Facts and Law in Symbolic Control

The *Symbolic Control* case involved a type of computer program ("software") commonly called "APT" (an acronym for Automatically Programmed Tools).[7] An APT computer program or "APT Processor" is used with a computer (sometimes called "hardware") to allow a machine tool parts programmer to prepare from engineering drawings an operating type for numerically controlled ("NC") machine tools ("NCMT"). A numeri-

---

5. CERVANTES, DON QUIXOTE, Bk. I, Ch. XVIII at 170 (Signet ed. 1964).

6. *See* J. KLEIN, THE MESTA, A STUDY IN SPANISH ECONOMIC HISTORY *passim* (Harvard ed. 1920). Klein noted Don Quixote's encounter with a Mesta flock on the sheep highway *de la Mancha*. *Id.* at 19 n.2. Mesta abuses, particularly during the migrations, frequently gave rise to litigation. *Id.* at 21 n.2. Klein reported estimates (which he doubts) of as many as seven million sheep in the Mesta flocks, in the approximate period of Don Quixote's attack on the vast ovine army before him.

The author is indebted to Ruth E. Carsch, Consulting Information Specialist, for finding Professor Klein's most informative study.

7. Brief for Appellant, Symbolic Control Inc. v. International Business Machs., [1980] Trade Cas. (CCH) ¶ 63,427 (9th Cir. 1980).

cally controlled machine tool is an automatic milling machine, drill, or lathe which will automatically cut or manufacture a piece of metal into the variously shaped parts used in the manufacture of airplanes, automobiles, or other products. The instructions are fed into the numerically controlled machine tool in the form of a paper control tape. It is in the preparation of this control tape that the assistance of a computer is essential. Preparation of these numerical control tapes starts with an individual part programmer, who is given an engineering drawing of the particular automobile, airplane, missile, or manufacturing part to be milled or lathed. From this drawing the part programmer writes a part program, which is a set of instructions which describe the tool motions to make the part. In writing the part program the part programmer uses a special computer language called the APT language, an English-like language like FORTRAN or COBOL which can be understood by a computer.

The part program is then put on a tape, card or disk and fed into a computer. The computer then uses an APT processor to calculate, in five axes, the precise location, speed and movement of the NCMT machine tool at every moment in the manufacture of the particular part desired.

Historically, the first APT processor was developed by the Massachusetts Institute of Technology pursuant to a contract with the United States Air Force. This basic APT processor was continuously modified for uses in the aerospace industry by the Aerospace Industries Association, and for a time, administered by the Illinois Institute of Technology Research Institute ("IITRI").

In the period after March, 1967, the most popular computer used for APT was the IBM System 360. The System 360 was a large and very expensive computer and many of the potential users of the System 360 were manufacturing companies which used computers for, among other things, APT processing.

An enthusiastic beneficiary of these developments, the Chairman of North American Rockwell, was quoted by IBM as saying: "The marriage of Numerical Control, the digital computer, and machine tools is one of the stunning technological innovations of our time. An achievement to rank with nuclear

power and with space flight as a third great development of our generation."[8]

In order to secure this computer business, IBM on March 31, 1967, offered an APT processor, called "NC 360," to replace IITRI's processor "APT III." An APT processor is one of the most complex computer programs ever written. It must be constantly improved in order for it to be used by manufacturing companies. Thus a large support staff is necessary to maintain the commercial viability of an APT processor, which IBM also supplied.

The court of appeals summarized the facts leading to the litigation:

> Between 1967 and 1970, IBM developed and distributed four versions of its APT processor, all designed for use with its System 360 computer . . . IBM furnished all versions of the NC 360 program free of charge, and provided free maintenance and modification levels . . .
>
> Symbolic was incorporated in March, 1969, for the purpose of selling an APT processor to be known as APT/70 . . . In January, 1971, Symbolic released a processor designed to be used only with IBM's System/360 computers . . .
>
> Symbolic sued IBM, alleging violations of Sections 1 and 2 of the Sherman Act . . . The theory of Symbolic's case was that, because of the importance of software in general and APT processors in particular to the sale of the large computers, IBM had a policy of giving the computer program, documentation, instructions to use the program, and maintenance of the program free of charge to computer users. Symbolic charged that this practice was illegal predatory pricing for the purpose of monopolizing the software market.[9]

Symbolic Control contended[10] that it had provided the only

8. Trial Record at 46, Plaintiff's Exhibit 2241, Symbolic Control Inc. v. International Business Machs., [1976] Trade Cas. (CCH) ¶ 60,723 (N.D. Cal. 1975).

9. [1980] Trade Cas. (CCH) at ¶ 76,240.

10. Brief for Appellant at 10, Symbolic Control Inc. v. International Business Machs., [1980] Trade Cas. (CCH) ¶ 63,427 (9th Cir. 1980).

real NC software competition for IBM hardware users, and that the record contained a good deal of testimony proving that APT/70 presented very stiff competition for IBM's NC 360. IBM's 360 was, however, bundled with its hardware and "free," and continually improved and maintained. Symbolic Control contended that by this practice IBM intended to, and did exclude Symbolic Control and "capture the market," and Symbolic Control put into evidence a classic Sherman Act § 2 intent document, authored by IBM's marketing manager in 1971:

> *The N/C strategy of this group was to capture the N/C marketplace* within an allowable budget ($300,000 per year). To do this sound management decisions were made . . . .
>
> . . . .
>
> In conclusion, the competency of *the N/C development group and its strategy to capture the N/C highly competitive market has done just that and IBM is currently number one.* This group has created and is protecting on a worldwide basis over $300,000,000 of hardware drag along since 1969 to present. This was done with a budget of around $300,000 per year (around one percent).[11]

The district court denied a pretrial motion by IBM for summary judgment but ordered a bifurcated trial to be directed only to "the issue as to whether plaintiff's business sustained legally cognizable impact by reason of act[s] of IBM." The district court purported to assume for the purposes of trial that there was a violation of the antitrust laws.

The court of appeals summarized the result below:

> At the close of Symbolic's evidence, the district court dismissed the suit against IBM, holding that the controlling evidence concerning impact of the alleged violation was tesimony by users of IBM's NC 360. These customers were the potential users of APT/70. The court held that evidence of possible consequences of IBM's pricing the program, rather than giving it away, was irrelevant, because such evidence would be specu-

11. *Quoting* Trial Record at 3, 7, Plaintiff's Exhibit 2241, Symbolic Control, Inc. v. International Business Machs., [1980] Trade Cas. (CCH) ¶ 63,427 (9th Cir. 1980).

> lative and that pricing would not have been possible after IBM placed its various versions of NC 360 in the public domain. [IBM's "ante-natal" conduct.] Relying on this analysis, the court found that there was no impact on Symbolic's business, since user testimony revealed that price was not, to them, a relevant factor in the decision to use one product or the other.[12]

The court of appeals then explored the trial court's error:

> The theory of Symbolic's case was that IBM had foreclosed competition in a product line. The court assumed a violation had occurred, but found that it did not cause the losses sustained by Symbolic. Yet, if the assumed violation consists of IBM's giving away a discrete product line in order to bar a potential entrant from competing with the line, it is difficult to assume anything but adverse competitive effects . . . .[13]

The court of appeals then dealt with the trial court's faulty analysis of the question of price, or IBM's lack of price. This zero price, according to the trial court, did no cognizable injury to Symbolic Control because IBM had already started to price its software for free before Symbolic Control's incorporation. On the issue of the fact of injury, the court of appeals found the trial court's analysis circular:

> The court's ruling was based, moreover, on the apparent premise of a demand for IBM's product that was impervious to price consideration. It assumes the very question in issue to argue that a product has been accepted over a competing product because of superior quality if the analysis is made wholly without reference to price.[14]

Inasmuch as the district court's bifurcation of violation and injury issues had led it into the errors elucidated by the court of appeals, the court of appeals reversed. Fundamental to the reversal was the court of appeals' analysis of the assumption of risk or "ante-natal" conduct defense, because the district court

12. [1980] Trade Cas. (CCH) at ¶ 76,240.
13. *Id.*
14. *Id.*

had accepted IBM's counsel's erroneous proposition that such an affirmative defense could deny recovery to an actually-injured antitrust plaintiff, injured by proven violations. IBM's trial counsel had insisted that the date of the plaintiff's entry into business (for example, before or after the inception of the violations) controlled on the issue of liability, citing *Buckeye Power Co. v. E. I. du Pont de Nemours Power Co.*[15]

The district court had made the following statement in a footnote to its opinion:

> The Court assumes, as it must for the purposes of this phase of the trial, that there was a violation of the antitrust laws. But this assumption in no way relieves plaintiff of the affirmative burden of proving that an act prohibited by statute which injured plaintiff's business or property was committed during the period of plaintiff's existence. *Buckeye Power Co. v. du Pont Power Co.*, 248 U.S. 55 (1918). Hence while evidence of pre-1969 conduct may have limited probative value in interpreting the actions of IBM during the post-1969 period (the period of plaintiff's existence), only post-1969 acts may be considered in determining whether plaintiff's business or property sustained legally cognizable impact by reason of such acts of IBM."[16]

This footnote, although appearing in the published opinion, was later stricken by the district court[17] "to avoid confusion," with respect to acts prohibited by statute, inasmuch as violation was to be assumed. Judge Zirpoli did not, however, change his basic premise that only post-1969 conduct could be considered, although he did say that the acts of IBM "regardless of their nature" had no impact on Symbolic Control.[18] Despite this

---

15. 248 U.S. 55 (1918).

16. [1976] Trade Cas. (CCH) at ¶ 60,723 n.3.

17. The district court struck its footnote 3 in its Order Denying Motion for a New Trial filed June 25, 1976. Clerk's Record at 1176, Symbolic Control Inc. v. International Business Machs., [1976] Trade Cas. (CCH) ¶ 60,723 (N.D. Cal. 1976).

18. *Id.* Some months after the filing of the trial court's memorandum decision, Judge Zirpoli again reiterated his erroneous acceptance of IBM's affirmative defense, during the argument on Symbolic Control's motion for a new trial.

> The question of impact or injury is strictly a fact question. I do not interpret it as a legal question. *The only legal question that arises is: Must the injury occur as the result of an act of*

statement, the court did not amend its opinion and continued to require "proving injury from acts of defendant during the relevant period."

The *Buckeye* case, upon which IBM and the trial court so heavily relied, arose from a judgment for the defendant where one of the plaintiff's exceptions to jury instructions was:

> The Judge remarked in his charge that the plaintiff did not stand like a competitor that had been in existence while the defendant's influence was being developed, and that had been injured in its business during the course of such development, — that the mere existence of the defendant's power as it was when the plaintiff was born was not in itself a cause of action to the plaintiff, but that the plaintiff must show that the defendant uses its power oppressively, if not against the plaintiff, at least in the course of defendant's business.[19]

The Supreme Court said that the exception "seems to us over critical" and that the Judge's remarks were "innocuous truth." Justice Holmes then indicated, "The plaintiff could not be called into being in order to maintain a suit for conduct that made it not pay to be born. Claims for such antenatal detriments are not much favored by the law."[20]

This tort principle, depending on the nature of the tort often denominated as "assumption of risk" or "consent," controls because the law does not permit one to see a tort violation and then put oneself in a position where a tort cause of action will arise, conferring such benefits as litigation may provide. In the words of the Restatement of Torts, "A person of full capacity who freely and without fraud or mistake manifests to another

---

> *the defendant in the course of the business existence of the plaintiff? I'm still convinced that it has to be an act within the course of the business existence of the plaintiff . . . .*

Trial Transcript at 40, Symbolic Control Inc. v. International Business Machs., [1976] Trade Cas. (CCH) ¶ 60,723 (N.D. Cal. 1976) (emphasis added). Even IBM's counsel backed off their position in the court of appeals, Brief for Appellee at 21 ff., Symbolic Control v. International Business Machs., [1980] Trade Cas. (CCH) ¶ 64,427 (9th Cir. 1980), in a discussion characterized by the court of appeals as "obscure." *Symbolic Control Inc.*, [1980] Trade Cas. (CCH) at ¶ 76,242.

19. 248 U.S. at 63-64.

20. *Id.* at 64.

assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct."[21] But even general tort law does not always recognize such a defense where a statute is involved. As Professor Prosser has noted, "If the defendant's act is a crime, affecting the interest of the public, the criminal law in many cases refused to recognize the consent of the injured party as a defense,"[22] and so too for the law of torts, according to Prosser.

The district court, however, erred most fundamentally in relying on *Buckeye* to dispose of Symbolic Control's case on pre-1969 conduct because to the extent that the district court read *Buckeye* as adopting a defense of assumption of risk or consent in antitrust law, it's holding was contrary to antitrust policy as shown by Supreme Court cases involving analogous tort defenses. (Moreover, the Supreme Court itself impliedly overruled Justice Holmes' dictum in *Buckeye* about antenatal acts, in *Simpson v. Union Oil Co.*,[23] as noted below.)

The district court's incorrect view of the law, accepting Justice Holmes' dictum on antenatal detriments as controlling, led to most of that trial court's other errors, because IBM argued successfully to the trial court that having given away the NC 360 program for free before Symbolic Control tried to sell its competing APT/70, any violation was "antenatal," and Symbolic Control had, therefore, assumed any risk of injury in connection with IBM's violations. Thus, in the trial court's view, IBM's zero price for NC 360 could not lead to legally cognizable injury. Indeed, the trial court so held in the footnote to its first opinion quoted above, which it struck after the motion for a new trial, but upon whose theory it continued to rely in its decision.

The court of appeals gave short shrift to IBM's assumption of risk argument, although the panel did not explain the casual connection between the trial court accepting the defense, and the procedural and substantive errors which the court of appeals had to reverse:

> Both the plaintiff and the defendant, as well

21. RESTATEMENT OF TORTS, § 892.
22. W. PROSSER, TORTS, § 18, at 107 (4th ed. 1971).
23. 377 U.S. 13 (1964), *rev'g* 311 F.2d 764 (9th Cir. 1963).

> as the trial court, spent much time and effort grappling with the concepts of "ante-natal violation" and "assumption of risk"; these concepts were thought to derive from the early Sherman Act case of *Buckeye Powder Company v. E. I. du Pont de Nemours Powder Company* . . . but . . . that case has no connection with Symbolic's suit against IBM. The plaintiff in *Buckeye* did not rely on any 'ante-natal violations' because, as the trial judge instructed the jury: "[a]t the time of the organization of the plaintiff company, . . . and during the entire time the plaintiff carried on its business, [the defendant] was acting in violation of the Antitrust Act as attempting to monopolize the trade in powder, which subjected it to be dissolved as such by direct attack on the part of the United States government." . . . Justice Holmes' 'ante-natal' dictum is a characteristic aphorism but has no bearing on his sound analysis, which did no more than state the obvious proposition that monoply power gives no private right of action unless used oppressively against a plaintiff to its detriment. The antenatal violation issue has even less bearing on the case before us.[24]

The court of appeals then, in its own footnote, disposed of the trial court's reliance on *Buckeye*:

> We cannot therefore accept the trial court's interpretation of *Buckeye*, that "an act prohibited by statute which injured plaintiff's business or property [must be] committed during the period of plaintiff's business [*sic:* existence]" as a prerequisite to recovery. This statement is not supported by *Buckeye* in any way, and is far too sweeping in any event. An obvious counter-example might be a patent that is fraudulently procurred by defendant before plaintiff's corporate existence, but in effect during its existence.[25]

The court of appeals continued, in the heart of its opinion:

> It is not clear what significance the trial

---

24. [1980] Trade Cas. (CCH) at ¶¶ 76,241-42 (quoting Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co., 223 F. 881, 887 (3d Cir. 1915) (citations omitted).

25. *Id.* at ¶ 76,242 (footnote 2 as published, renumbered footnote 4 by order of Nov. 19, 1980, *see* note 1 *supra*).

> court's comments have that 'plaintiff knew,' before entering business, about this or that aspect of IBM's marketing. See *Symbolic Control Inc., supra,* [1976-1] (CCH) Tr. Cas. at 68,098. Symbolic's knowledge of IBM's alleged misdeeds is irrelevant . . . . Even if Symbolic were brought into existence in circumstances where it was probable that it would be entitled to sue by reason of competitive injury, this alone has nothing to do with its right to recover as long as the three-fold requirements of violation, impact, and measure of damages are met.[26]

Thus, given fulfillment of the requirements of the three-fold test of antitrust liability,[27] no affirmative defense of assumption of risk or its like will bar an antitrust treble damage recovery in the Ninth Circuit. This rule is consistent with, and furthers, the national antitrust policy favoring a treble damage recovery to any person actually injured by an antitrust violation, irrespective of technical defenses. The disfavor in which affirmative defenses are held in the jurisprudence of the Supreme Court certainly augers well for the fate of the Ninth Circuit's decision in *Symbolic Control,* should it go up on certiorari. Rehearing en banc has already been denied.[28]

B. Affirmative Defenses are Disfavored in Private Antitrust Cases to Further National Antitrust Enforcement Policy

Because of the importance of private enforcement of the antitrust laws, the Supreme Court and the Ninth Circuit have consistently disfavored affirmative defenses in antitrust cases. If the private plaintiff can make the three-fold case of violation, fact of injury, and measure of damages, it is entitled to recover free of the bar of some affirmative defense that would permit a wrongdoer to evade just reparations on some technical grounds. For example, the Ninth Circuit in *Simpson v. Union Oil Co.,*[29]

---

26. *Id.* at ¶ 76,242.

27. *Cf.* Radiant Burners v. People's Gas, Light & Coke Co., 364 U.S. 656, 660 (1961) ("to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.").

28. *See* note 1 *supra.*

29. 311 F.2d 764 (9th Cir. 1963).

before it saw the light, in effect allowed an assumption of risk defense to a guilty antitrust defendant, and was promptly reversed,[30] there being no good policy reason to permit technical defenses to profit wrongdoers with retention of their proverbial "ill-gotten gains."

Both the Ninth Circuit and the Supreme Court have consistently recognized that private enforcement of the antitrust laws implements national antitrust policy, as of course, have the academic commentators.[31] In separate opinions, the Ninth Circuit has said, for example, "The provision for the recovery of treble damages by an injured party was an important and significant feature of the entire antitrust program;"[32] and "[t]he treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute."[33]

The Supreme Court has similarly said, "It is clear that Congress intended to use private self-interest as a means of enforcement . . . when it gave to any injured party a private cause of action . . . ,"[34] and "[T]he purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."[35]

Indeed, the antitrust bar itself has joined the Ninth Circuit and the Supreme Court in stressing the importance of private enforcement. In a comprehensive review of the federal antitrust laws, the historic Report of the Attorney General's National Committee to Study the Antitrust Laws stated:

> In addition to proceedings by the Department [of Justice] and [the Federal] Trade Commission, private suits aid antitrust enforcement. The private antitrust suit blends antitrust policy with private compensatory law: on the one hand, as one Clayton Act proponent put it, such suits

30. 377 U.S. 13 (1977).

31. *See, e.g.*, P. AREEDA & D. TURNER, ANTITRUST LAW, § 331 at 149-50 (2d ed. 1978).

32. Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 828 (9th Cir. 1963).

33. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).

34. Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947).

35. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).

> aim to enlist "the business public . . . as allies of the Government in enforcing the antitrust laws;"
>
> . . . .
>
> Such proceedings have a vital role to play in aiding understaffed Government agencies to enforce antitrust prohibitions throughout the Nation.[36]

This policy of encouraging private antitrust enforcement has played a substantial role in the decisions of the courts of appeals and the Supreme Court, and thus affirmative defenses in antitrust cases have fared ill. For example, in a case involving the affirmative defense of res judicata, the Supreme Court said:

> There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action.[37]

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[38] the Supreme Court rejected the affirmative defense of "pass-on," citing the importance of retaining the effectiveness of private antitrust enforcement. As the Court noted, if a passing-on defense was allowed, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."[39]

Similarly, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[40] wherein the court of appeals had held that *in pari delicto* was a defense to a private action, the Supreme Court, in reversing, said, "[b]ecause these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United

---

36. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 378-80 (1955) (*citing* 51 CONG. REC. 16319 (1914)).

37. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329 (1954).

38. 392 U.S. 481 (1968).

39. *Id.* at 494.

40. 392 U.S. 134 (1968).

States, we granted certiorari."[41]

A corollary of this policy of encouraging private antitrust enforcement has been that the courts should not limit the efficacy of this policy through strict judicial construction and court-imposed limitations on the right of recovery. In *Radovich v. National Football League,*[42] the Supreme Court, in overruling objections to the sufficiency of the complaint, stated:

> Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.[43]

Similarly, in holding that settlement sums were to be deducted from the treble and not the single damages, the Ninth Circuit said:

> The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial constructions.[44]

As another example of this policy implemented, the Supreme Court has limited the role that even the affirmative defense of the congressionally enacted statute of limitations may play in antitrust cases. In *Zenith Radio Corp. v. Hazeltine Re-*

---

41. *Id.* at 136.
42. 352 U.S. 445 (1957).
43. *Id.* at 453-54 (citations and footnotes omitted).
44. Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1954). *Accord,* Hydrolevel Corp. v. American Soc'y Mechanical Eng'rs, 635 F.2d 118 (2d Cir. 1980).

search, Inc.,[45] the only issue was whether a plaintiff had been injured within the four years, irrespective of how long ago the acts took place. Since *Zenith*, an antitrust defendant cannot plead that the statute of limitations has run on violative acts if injury by reason of those acts has accrued within the limitations period, only recently permitting the measure of damages. Without citing *Zenith*, the Ninth Circuit in *Symbolic Control* applied the *ratio decidendi* of *Zenith* to the claim of "ante-natal" violation as a defense, and held that the fact of injury, rather than the date of initial violation, determines liability, and thus explicitly eliminated yet another would-be affirmative defense to a treble-damage cause of action.

C. *Illinois Brick:* The Passing-On Defense and a Fearful Love of Symmetry

The Supreme Court in *Illinois Brick* reaffirmed its holding and reasoning in *Hanover Shoe* that a plaintiff having passed on an illegal overcharge is no defense in a treble damage action. Unfortunately, from the point of view of effective antitrust enforcement, the Court in *Illinois Brick* thought that mere symmetry required that, in the absence of the passing-on defense, *only* a plaintiff purchasing directly from the antitrust wrongdoers should have the right to sue. In other words, the Court returned privity, or rather lack of privity, to the diminishing stable of antitrust affirmative defenses. The Court expressed concern about double recovery and the like, but the thrust of the decision was that it was simply fair (and required by *stare decisis*) to deny any plaintiffs but direct or first purchasers the right to sue if the Court had already, as it had, denied defendants the affirmative defense of passing-on against first purchasers.

To use Yeats' phrase, it was indeed a fearful love of symmetry that led to this perverse result. This symmetry permits the escape of antitrust wrongdoers *whenever* no direct purchaser chooses to sue. First purchasers have every disincentive to sue, inasmuch as they generally prefer to do business with their suppliers as suppliers rather than litigate with them as defendants.[46] Of course, the Supreme Court evidently believed that

---

45. 401 U.S. 321 (1971).

46. *See, e.g., Hearings on H.R. 8359 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 95th Cong. 1st Sess. 166, 171 (1977)

such disincentives would be overcome by establishing only first purchasers as bounty hunters,[47] entitled to all of the illegal overcharge trebled, whether or not they in fact passed-on any or all of the illegal overcharge. The reality of the disincentives facing first purchasers, and the effectiveness of state attorneys general as private treble damage plaintiffs, albeit usually as last purchasers, went unmeasured by the Court.

In its prior jurisprudence, the Supreme Court has forthrightly denied to antitrust wrongdoers affirmative defenses, and indeed, in *Illinois Brick,* the Court reiterated this result, specifically with respect to the troublesome defense of passing-on. No cry of "fairness for defendants" had deflected the Court from the national policy of effective enforcement of the antitrust laws by means of the private action. Yet, in *Illinois Brick,* this supposed fairness became a rule of decision likely to emasculate private enforcement, particularly by denying the role of the states in the large industry-wide price fixing cases, the prosecution of which often require significant resources. No antitrust wrongdoer should benefit from this sort of "fairness" which undercuts such a fundamental national policy.[48] It is fair to deny an affirmative defense to particular sorts of wrongdoers for particular policy reasons; no issue of *fundamental fairness* or due process arises, because the protections of due process are afforded in the initial determinations of wrongdoing. All that is at issue is who shall have redress, including the statutory treble and exemplary damages. With respect to this issue, the Supreme Court (as well as this circuit) has long held that affirmative defenses shall not provide a technical bar to redress against such proven wrongdoers. Such wrongdoers having no right to plead affirmative defenses in bar, so much less so should some fancied symmetry between plaintiffs and defendants in effect provide a resurrected affirmative defense of "absence of privity"[49] to proven antitrust wrongdoers. Plaintiffs and defendants no more deserve "equal" treatment in substantive rules of law than do hangmen and

---

(statement of Josef D. Cooper, Esq.).

47. Compare *Hearings on H.R. 2060 and H.R. 2204 and Other Proposals Restoring Effective Enforcement of the Antitrust Laws, before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary,* 96th Cong. 1st Sess. 258, 345 (1979) (testimony of Bartholomew Lee) [hereinafter cited as Lee testimony].

48. Lee testimony, *supra* note 47, at 259-60.

49. See Perkins v. Standard Oil Co., 395 U.S. 642 (1969), thought to have been the death knell for absence of privity as a defense.

felons, because it is exactly because of particular substantive rules of law that particular parties find themselves plaintiffs and defendants. The Supreme Court has simply resuscitated a long dead affirmative defense—privity—because it ten years ago denied defendants the related affirmative defense of passing-on. Such symmetry exactly misses the point often made by the Court in other contexts, and implemented by the Ninth Circuit in *Symbolic Control*: If a plaintiff proves violation, fact of injury, and measure of damages, the plaintiff recovers free of technical defenses that permit the escape of proven violators. The Ninth Circuit decision in *Symbolic Control* reaffirms the principle that affirmative defenses have no place in private antitrust cases. This principle, otherwise honored and indeed instituted by the Supreme Court, should have been applied by the Court in *Illinois Brick* exactly as it was by the Ninth Circuit in In re *Western Liquid Asphalt Cases*,[50] on the indirect purchaser's right to sue. Instead of demonstrating its love of symmetry, the Court could and should have stood on principle, and let any plaintiff, *injured in fact*, have standing to sue, while preserving the rule of *Hanover Shoe* that no defendant may assert passing-on as a defense. Any number of devices are available to avoid the assumed evils of double recovery; for example, that the first plaintiff to judgment take the full recovery, would be a salutory rule in these days of protracted cases.[51] The courts, and Congress, could easily work out such devices for any real difficulties.[52] Yet, what has happened has been the sacrifice of princi-

---

50. 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); the Ninth Circuit held:

> The antitrust laws are to be construed so as to achieve the broad goals which Congress intended to effectuate. Fred Meyer, Inc., . . . 390 U.S. [341,] 349, 88 S. Ct. 904. One such policy goal is that there be no hiatus in the enforcement of these laws. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136, 138, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968). Each individual who is injured may sue. Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 263, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972). Thus, while we should not impose multiple liability upon defendants, nor give recovery to uninjured plaintiffs, neither should we bar recovery to those who can demonstrate that they bore the burden of the violation.

487 F.2d at 200.

51. *See* Lee testimony, *supra* note 47, at 260; P. AREEDA & D. TURNER, ANTITRUST LAW § 337 n.4 (2d ed. 1978), independently arrive at this proposal.

52. *See* P. AREEDA & D. TURNER, II ANTITRUST LAW, § 337(f) (2d ed. 1978). In *In re* Western Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), the court stated:

ple, and policy, in the name of symmetry. The rule of the Ninth Circuit in *Symbolic Control* that only the three-fold test of violation, fact of injury, and measure of damages need be satisfied for recovery is a rule that requires an opposite result in *Illinois Brick,* and one which obviates mere symmetry as a rule of law. Between policy and symmetry, the courts, however high, should opt for policy.

D. Conclusion

Affirmative defenses are barriers with no place in the private plaintiffs' road to an antitrust recovery. Congress, having

---

> It is urged that our decision for appellants would result in requiring appellees to twice pay treble damages. As we have said, the amount of the overcharge is not subject to double payment, because appellees' liability in that regard is to be apportioned after the amount of the overcharge is fixed. Further, each plaintiff (including appellants), be he intermediary or ultimate consumer, will be awarded only such further damages, including lost profits, as he may reasonably prove allocable to him.
>
> We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations is another; later suits, after final judgment herein, are unlikely. 15 U.S.C. § 15b. In other cases, it may be that statutory interpleader, 28 U.S.C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.

Given *Illinois Brick,* the Ninth Circuit perhaps spoke this last a bit too soon. Reading between the lines, the Supreme Court in *Illinois Brick* seems to have been persuaded that such good intentions had gone awry, and that the first purchaser to last purchaser industry antitrust cases simply created too much exposure to defendants. The essence of the argument is that the antitrust laws should not be played as a judicial game of "you bet your company". *See* 431 U.S. at 747 n.31. (citing Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?,* 70 F.R.D. 199 (1976). It is, however, company managements which decide which risks to take, well counseled by corporation lawyers, and as Mr. Dooley once said: "What t' you and me looks like a brick wall, t' a corporation lawyer can look like a triumphal arch."

seen fit to provide the incentive of treble damages, has expressed the national policy in favor of private enforcement so often emphasized by the Supreme Court, and reaffirmed by the Ninth Circuit in *Symbolic Control*. However quixotic the private plaintiff's quest may be, a plaintiff should be entitled to a trial (by jury if not by combat) free of such artificial roadblocks as affirmative defenses, because such a plaintiff furthers a national policy in favor of competitive markets by his very existence. "Ante-natal" conduct should no more be a defense to an antitrust wrongdoer than should be "absence of privity." The purpose of the treble damage provisions of the Clayton Act is obviously to deter wrongdoing as well as to induce the wronged to sue, and *any* affirmative defense simply undercuts the congressional purpose to provide effective and workable sanctions against non-competitive business conduct. Affirmative defenses have no more place in antitrust law than do anticompetitive practices in the market place, when such anticompetitive practices, price-fixing and the like, the antitrust laws were enacted to eliminate. As the Ninth Circuit implicitly recognized in *Symbolic Control*, affirmative defenses in antitrust cases can only foster anticompetitive conduct. The law is well rid of them.

II. THE DEMISE OF MANDAMUS GUIDELINES IN THE NINTH CIRCUIT

A. Introduction

Discretionary use of writs of mandamus in the Ninth Circuit was recently expanded by the Ninth Circuit Court of Appeals in *Varsic v. United States District Court*.[1] Recognizing that the petitioner might be denied his chance to pursue the merits of his cause of action because of a lack of the financial means necessary to present his claim in New York, Justice Wallace vacated a change of venue order and retained jurisdiction in the United States District Court for the Central District of California. While the immediate effect of this decision may be favorable, the ramifications of expanding the use of mandamus based on the problems of individual petitioners are inconsistent with the

1. 607 F.2d 245 (9th Cir. 1979) (per Wallace, J.; the other panel members were Hug, J., and Solomon, D. J., sitting by designation).

purpose and scope of mandamus relief.

B. FACTS

John Varsic filed an action against the Amalgamated Insurance Fund, its Board of Trustees, and its Administrator,[2] claiming that he was denied pension benefits to which he was entitled under the Employee Retirement Income Security Act of 1974 (ERISA).[3] Varsic sought declaratory, injunctive, and monetary relief on behalf of himself and others similarly situated. Because of his limited income,[4] Varsic was allowed to proceed in the United States District Court in forma pauperis.

The Fund moved for dismissal, and alternatively, for a transfer to the United States District Court for the Southern District of New York, arguing that venue did not properly lie in the Central District of California.[5] The defendants claimed the ERISA venue provision[6] was intended to require an action under the Act to be brought in the Fund's district of residence.[7] The district court judge agreed with the defendants' narrow construction of the ERISA venue provision and granted the Defendants' motion for a transfer to New York.

Varsic petitioned the Ninth Circuit Court of Appeals for relief on a writ of mandamus. The appellate court granted his petition.

C. DECISION AND RATIONALE OF THE COURT

In granting Varsic's petition for a writ of mandamus, the

---

2. Hereinafter collectively referred to as "the Fund."

3. 29 U.S.C. §§ 1001-1381 (1976).

4. The court noted that Varsic's sole source of income was his social security entitlement. 607 F.2d at 252.

5. This motion was brought pursuant to 28 U.S.C. § 1406 (1976), which states that: "[t]he district court of a district in which is filed a case laying venue in the wrong division of district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

6. 29 U.S.C. § 1132(e)(2) (1976) states:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

7. "The Fund urges an interpretation of this section [29 U.S.C. § 1132(e)(2) (1976)] such that all four roads would lead exclusively to its home office." 607 F.2d at 248.

Ninth Circuit decided both that the district court's transfer order was erroneous as a matter of law[8] and that the circumstances of this case warranted extraordinary relief.

In order to find that mandamus should issue to correct the district court's error, the court of appeals used the analysis promulgated in *Bauman v. United States District Court.*[9] In *Bauman,* the court of appeals refused to modify a class action certification because there were no extraordinary circumstances of the type necessary to justify the discretionary use of an extraordinary remedy such as mandamus. The *Bauman* court set up five guidelines for determining when extraordinary circumstances necessitate the issuance of a writ of mandamus: 1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires; 2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) the district court's order is clearly erroneous as a matter of law; 4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; 5) the district court's order raises new and important problems, or issues of law of first impression.[10]

Applying the *Bauman* test to a change of venue motion, the court of appeals determined that, although the circumstances in the *Varsic* case did not comply with all of the *Bauman* guidelines, mandamus should lie. The court pointed out that the *Bauman* guidelines are not to be used as strict requirements for mandamus, but rather should be used in a balancing fashion to determine the propriety of issuing mandamus in a given situation.

The court viewed the irremediable, extraordinary hardship that a transfer to New York would place on Varsic as weighing heavily in his favor.[11] Regardless of whether the district court's

8. The court of appeals determined that if personal jurisdiction could be properly asserted over the Fund, it could be "found" in the Central District of California in compliance with the ERISA venue provision.

9. 557 F.2d 560 (9th Cir. 1977).

10. Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

11. The court took into consideration the fact that Varsic's sole source of income was his social security entitlement. Moreover, the court noted that Varsic was permitted to proceed in district court in forma pauperis and was represented by counsel from the Legal Servs. Corp., 607 F.2d at 252.

order may be reversed on later appeal to the Second Circuit, a favorable decision on appeal would not cure the burden placed on Varsic by the district court's transfer order. This is exactly the type of situation in which mandamus is viewed as the appropriate remedy by the Ninth Circuit.[12]

D. Discussion

Background of Writ of Mandamus

A court of appeals has the power to issue a writ of mandamus in appropriate circumstances by authority of the All Writs Act.[13] Mandamus has been traditionally used to correct lower court errors in jurisdiction.[14] Where a district court has overreached its jurisdictional limitations or failed to assert jurisdiction over an action clearly within its scope, traditional mandamus will lie.[15] Courts have also employed writs of mandamus to correct orders which show a clear abuse of judicial discretion which amounts to a "usurpation of power" by the district court.[16]

---

12. "Indeed, the very nature of the prejudice which we find material in part (2) of the *Bauman* test, applies with great force to part (1) as to the adequacy of any relief which is available to Varsic without mandamus." *Id.*

13. 28 U.S.C. § 1651 (1976) states:

> (a) The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

14. *Ex parte* Peru, 318 U.S. 578 (1943) (writ of mandamus issued to prevent improper jurisdiction from being asserted over a foreign vessel).

15. In Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943), the Supreme Court stated that:

> [t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

Id. at 26 (citations omitted).

16. DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945). The Supreme Court vacated injunctions sequestering foreign assets where the lower court had no statutory authority to take such action. *See also,* Bankers' Life & Cas. Co. v. Holland, 346 U.S. 349 (1953), where the Supreme Court affirmed the Fifth Circuit's denial of a petition for writ of mandamus on the grounds that such a writ should not be used as a substitute for an interlocutory appeal but only to correct abuses of judicial power.

The Supreme Court has interpreted the All Writs Act[17] to authorize *supervisory* mandamus powers in the federal courts of appeal.[18] This expanded reading of the Act allows discretionary review of erroneous lower court orders not associated with the power or jurisdiction of the district court. This supervisory power is premised on the fact that the 'exceptional circumstances' surrounding an abuse of discretion by the district court necessitates the use of mandamus in order to ensure proper judicial administration within the federal system.[19]

In 1964, the Supreme Court again broadened the scope of mandamus by allowing mandamus to be used to settle important questions of first impression. In the case of *Schlagenhauf v. Holder,*[20] the Supreme Court invoked a new type of *advisory* mandamus to explain the proper construction of Federal Rule of Civil Procedure 35.[21] Mandamus was determined to be the proper tool for interpreting rules formulated and enforced by the courts.[22]

The Traditional Use of Mandamus in the Ninth Circuit

In accordance with the Supreme Court's interpretation of the All Writs Act,[23] the Ninth Circuit views mandamus as an extraordinary remedy to be reserved for extraordinary situations.[24] Mandamus will not be granted if there is any possibility that the petitioner's grievance can be rectified on appeal.[25] This

17. 28 U.S.C. § 1651 (1976). *See* note 13 *supra* for the text of the statute.

18. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) (affirming issuance of a writ of mandamus preventing a district court from referring an anti-trust case to a master). *See generally*, Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

19. LaBuy v. Howes Leather Co., Inc., 352 U.S. 259 (1957).

20. 379 U.S. 104 (1964).

21. FED. R. CIV. P. 35 allows a court to compel a party in an action in which the mental or physical condition of that party is in controversy to submit to a physical or mental examination by a physician.

22. Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964).

23. 28 U.S.C. § 1651 (1976). See note 13 *supra* for the text of statute.

24. *See Ex parte* Fahey, 332 U.S. 258 (1947); Kerr v. United States Dist. Court, 426 U.S. 394 (1976); Green v. Occidental Petroleum Corp. 541 F.2d 1335 (9th Cir. 1976); Southern Cal. Theatre Owners' Assoc. v. United States Dist. Court, 530 F.2d 955 (9th Cir. 1970); Hartley Pen Co. v. United States Dist. Court 287 F.2d 324 (9th Cir. 1961).

25. In denying a writ of mandamus to vacate a change of venue order, the court of appeals stated: "The remedy of appeal from a final judgment is 'inadequate' so as to justify the use of mandamus only when it is totally unavailable, or when because of the particular circumstances, it could not correct extraordinary hardship." Gulf Research &

policy of refusing to employ mandamus as a substitute for interlocutory appeals stems from the court's desire to discourage piecemeal appellate review. "[I]n an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation."[26]

Mandamus has been used by the Ninth Circuit in both traditional and supervisory situations. Traditional uses include cases where the district judge has acted in a manner which amounts to a usurpation of power or where the district judge incorrectly invoked or failed to invoke jurisdiction.[27] The Ninth Circuit has invoked supervisory mandamus power where a district judge has made an error in discretion which would result in a severe miscarriage of justice if not corrected by mandamus.

Usurpation of power by a district court has been deemed to justify mandamus since unauthorized actions of the district court cannot be remedied on appeal.[28] This is not a case of improper resolution of an issue properly before the court, but rather an improper use of judicial control which must be prevented by extraordinary relief.[29]

Failure of the district court to invoke its jurisdiction has

Dev. Co. v. Harrison, 185 F.2d 324 (9th Cir. 1950). *See also* Hartley Pen Co. v. United States Dist. Court, 287 F.2d 324, 328 (9th Cir. 1950), where the court of appeals stated: "In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there are present exceptional circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice."

26. Kerr v. United States Dist. Court, 426 U.S. 394 (1976), *aff'g* 511 F.2d 192 (9th Cir. 1975) (petition for writ of mandamus to vacate two discovery orders denied because claim of confidentiality was not properly made and petitioners had other avenues of relief available to them). *See also* Belfer v. Pence, 435 F.2d 121 (9th Cir. 1970), where the court of appeals refused to issue mandamus to vacate a discovery order against nonparties, finding that there was no evil not correctable on appeal.

27. Bankers' Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945); Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943).

28. Pan Am. World Airway, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975) (writ of mandamus granted to prevent district judge from notifying potential plaintiffs in an airplane crash of actions already pending, since such notice was not explicitly authorized by statute or rule).

29. Hartland v. Alaska Airlines, 544 F.2d 992 (9th Cir. 1976) (where district court judge ordered petitioners' lawyers to pay a percentage of settlement on a wrongful death claim which had not yet been filed into a fund to be used for attorneys fees for all actions arising from the same air crash, *held* that this usurpation of judicial power clearly warranted extraordinary relief).

arisen most frequently in change of venue situations. Review by the appellate court of a clearly erroneous transfer order through the use of mandamus has been found to be a proper exercise of the court of appeals' mandamus power.[30] The rationale behind the use of mandamus here is that an improper transfer of an action to another district will often frustrate the appellate power of the circuit court.[31] For example, if an action were improperly transferred from California to New York, the Second Circuit would have appellate review power at the end of the trial over the transfer order made by a district judge in the Ninth Circuit.[32] To prevent this confused process of review, the Ninth Circuit will deal with the propriety of transfer orders through the use of mandamus.

The Ninth Circuit will also issue mandamus to compel a change of venue transfer if the denial of such a transfer is "clearly erroneous."[33] The Ninth Circuit has determined that since the purpose of a change of venue order is to "avoid the disruption, expense, and inconvenience parties and witnesses must suffer by having the trial in an improper forum,"[34] failure to rectify an erroneous denial of a transfer motion would be uncorrectable by appeal and, therefore, must be remedied by mandamus.

Supervisory Mandamus in the Ninth Circuit

What is sufficient to constitute a clear abuse of discretion necessary to invoke supervisory mandamus has not been precisely defined by the Ninth Circuit. Erroneous class certifica-

30. In Commercial Lighting Prod., Inc. v. United States Dist. Court, 537 F.2d 1078 (9th Cir. 1976), the court set aside a transfer order to another district where the action could not have been originally brought, saying: "[m]andamus will lie to review a clearly erroneous transfer order entered under section 1404(a)." *Id.* at 1079.

31. Gulf Research & Dev. Co. v. Harrison, 185 F.2d 457, 459 (9th Cir. 1950) ("the writ will issue to compel an inferior court to proceed in an action which properly invokes that court's jurisdiction in order to prevent the inferior court, by inaction, from frustrating the legitimate appellate jurisdiction of this court.").

32. Magnetic Eng'r & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866, 870 (2d Cir. 1950) ("The review of any order of the district court in a transferred cause made before transfer, is within the jurisdiction of the court of appeals of the circuit to which the cause has been transferred. . . .").

33. In Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 951-52 (9th Cir. 1968), the court of appeals stated: "This court, in line with the rule in most other circuits will, however, review on mandamus clearly erroneous orders entered under section 1404(a)."

34. Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 952 (9th Cir. 1968).

tion,[35] improper discovery orders,[36] and irrational transfer orders[37] have all been held by the court of appeals to be possible sitautions warranting mandamus relief. However, the Ninth Circuit will generally not use mandamus to correct a district court's error in discretion unless extraordinary circumstances are expressly demonstrated by the petitioner.[38]

Mandamus after Bauman v. United States District Court

In *Bauman* the Ninth Circuit clarified the term 'extraordinary circumstances' by establishing guidelines for when a writ of mandamus should issue.[39] The court held that "[a]s with many other facets of judicial power, the continuing effectiveness of an appellate court's section 1651 power depends on its reasoned and principled exercise."[40] Recognizing the dangers of issuing writs too frequently,[41] the court attempted to make the criteria for issuance of writs of mandamus more concrete and workable.

---

35. In McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) the court of appeals stated that: "[w]hile erroneous class action certifications may rarely be corrected by mandamus . . ., the certification in this case constitutes a *clear abuse of discretion* sufficient to invoke this extraordinary writ . . . ." *Id.* at 1087 (emphasis added). Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977) (refusal to modify a class certification by means of a writ of mandamus). Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir. 1977) (refusal to annul a class action certification).

36. Guerra v. Board of Trustees, 567 F.2d 352 (9th Cir. 1977) (ready availability of alternatives to mandamus to protect petitioners' confidential files justify denial of writ to vacate discovery orders); Southern Cal. Theatre Owners Ass'n v. United States Dist. Court, 430 F.2d 955, 956 (9th Cir. 1970) (denial of petition to vacate discovery orders because petitioner could have sought protective orders instead) ("[m]andamus to review discovery orders is an extraordinary remedy which issues only in very unusual circumstances or to correct an immediate and irreparable injury.").

37. American Fidelity Fire Ins. Co. v. United States Dist. Court, 538 F.2d 1371, 1375 (9th Cir. 1976) (writ vacating a transfer of a cross-claim to the Court of Claims not warranted because it could not be concluded that there was "no rational and substantial legal argument in support of the district court's decision").

38. In Gulf Research & Dev. Co. v. Harrison, 185 F.2d 457 (9th Cir. 1950), the court of appeals refused to vacate a § 1406 change of venue order on the grounds that no particular hardship had been shown. Since the corporate litigants did not demonstrate that it would be any more expensive or burdensome to try the case in the Third Circuit than in the Ninth Circuit, mandamus relief was denied.

39. Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977).

40. *Id.* at 654.

41. The *Bauman* court identified three specific dangers inherent in issuing writs of mandamus: 1) the subversion of the policies underlying the finality rule or the limitations on interlocutory appeals, 2) the undermining of mutual respect between the federal and appellate courts, and 3) the issuance of writs based on sympathy rather than reason and principle. *Id.* at 653-54.

Although *Varsic* is the first case to apply the *Bauman* guidelines to a change of venue order, the Ninth Circuit has previously used the *Bauman* analysis in other fact situations. Focusing on the first prong of the *Bauman* test,[42] the court of appeals refused to vacate a discovery order in *Guerra v. Board of Trustees,*[43] saying that the ready availability of alternatives[44] to mandamus to ensure the confidentiality of documents made extraordinary relief unnecessary.

In *United States v. Sherman,*[45] a criminal case, the court issued a writ of mandamus vacating the trial court's bar on interviews of jurors by the press after a verdict had been returned. Balancing the *Bauman* indicators, the court found that mandamus should issue there because the petitioners[46] had no other adequate means of relief, the petitioners would be damaged in a way not correctable on appeal, the district court's order was erroneous as a matter of law,[47] and the order raised important problems of first amendment law.

Mandamus in Other Circuits

Other circuits are not entirely consistent in the use of mandamus with the Ninth Circuit. Generally the Second Circuit will issue a writ of mandamus when there has been a usurpation of power by the district court, but not for an error in discretion.[48] The Second Circuit does, however, recognize certain situations in which supervisory mandamus is appropriate. Where a ques-

42. *Id.* at 654 ("[T]he party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.").

43. 567 F.2d 352 (9th Cir. 1977).

44. The court cited the use of in camera disclosure, sealing of records, use of assumed names and strict control over copies as examples of alternatives. *Id.* at 355.

45. 581 F.2d 1358 (9th Cir. 1978).

46. The *Sherman* court first dealt with the issue of whether the press had standing to seek a writ of mandamus. The court determined that since the petitioners had been injured in fact by the district judge's order and the injury dealt with the petitioners' legally protected zone of interest, the petitioners had standing to seek mandamus relief. *Id.* at 1360 (citing Data Processing Serv. v. Camp, 397 U.S. 150 (1970)).

47. The *Sherman* court held that unless the district court's order could be justified by more than protecting jurors from harrassment and preserving their impartiality to enable them to serve on future juries, the district court's order was erroneous as a matter of law because it interfered with petitioners' first amendment rights.

48. American Flyers Airline Corp. v. Farrell, 385 F.2d 936, 938 (2d Cir.), *cert. denied,* 390 U.S. 1012 (1967) (denial of writ to compel a change of venue transfer) ("[I]t is worthy of note that this court has never in its history granted one of these writs to compel a transfer.").

tion of law presents an issue capable of general resolution, supervisory mandamus will be used to oversee the proper administration of justice within the circuit.[49]

The Eighth Circuit employs mandamus to rectify abuses of discretionary power by the district courts.[50] However, mandamus will only lie in the Eighth Circuit if appellate review is inadequate and the order presents questions of substantial importance to the administration of justice.[51]

The Tenth Circuit's use of mandamus relief is more akin to that of the Ninth Circuit. A writ will issue for a clear abuse of discretion, an abdication of judicial function, or the usurpation of judicial power under exceptional circumstances.[52]

E. Critique

It is obvious that the court of appeals was faced with a dilemma in the *Varsic* case. Given petitioner's limited financial means and the expense of bringing trial in New York, denial of the writ would have precluded Varsic from pursuing his claim. The court could not, however, ignore the precedent of limiting discretionary mandamus relief to extraordinary situations.

The precedent of reserving mandamus relief for extraordinary circumstances has been firmly established in the Ninth Circuit since *Ex parte Fahey*.[53] The recent *Bauman* decision appeared to clarify the meaning of extraordinary circumstances

---

49. International Business Mach. Corp. v. United States, 471 F.2d 507, 516 (2d Cir. 1972) (petition granted to vacate a discovery order in an antitrust suit).

50. Knight v. Alsop, 535 F.2d 400 (8th Cir. 1976) (writ granted to compel convening of three-judge court in action challenging constitutionality of state statute); Cessna Aircraft Co. v. Skyways, Inc. 532 F.2d 64 (8th Cir. 1976) (denial of petition for writ of mandamus to compel leave to file cross-claim because trial court did not abuse its discretion in denying permission); White Industries, Inc. v. Cessna Aircraft Co., 518 F.2d 21 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975) (refusal to issue writ of mandamus to overturn class action certification because abuse of judicial discretion not proved).

51. Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949 (8th Cir. 1979) (writ of mandamus granted to partially lift protective order during discovery); Pfizer, Inc. v. Lord, 456 F.2d 545 (8th Cir. 1972) (petition for a writ of mandamus to vacate a discovery order based on attorney-client privilege granted in part).

52. Paramount Film Distrib. Corp. v. Civic Center Theatre, 333 F.2d 358 (10th Cir. 1964) (petition for writ of mandamus to vacate discovery order denied for lack of exceptional circumstances); Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975) (mandamus granted to vacate a discovery order).

53. 332 U.S. 258 (1947).

and to provide very practical guidelines for issuance of mandamus to correct judicial errors in discretion.

Justice Wallace did not find that a usurpation of power existed that would warrant traditional mandamus relief. Instead, he found that Varsic's petition complied with the *Bauman* guidelines. Since Justice Wallace purported to follow the *Bauman* test rather than vacate the district court's order under traditional mandamus theory, the effect of *Varsic* on the *Bauman* test is worthy of consideration. The cases in which the *Bauman* test has been used prior to *Varsic* demonstrate that *Bauman* was meant to place limits on the discretionary use of mandamus. In *Guerra,*[54] where there were other possible alternatives to employing mandamus, the court did not grant the writ. In *Sherman,*[55] the petitioners had *no other possible* remedy, since they were not parties to the underlying criminal action. The *Bauman* analysis was easily applicable to each of these cases since the first guideline could clearly indicate whether or not extraordinary relief was warranted. However, *Varsic* was not as simple. Since an erroneous change of venue order can be raised on appeal at the conclusion of the trial, it cannot be said that Varsic was totally without a remedy. Yet, if Varsic could not afford to litigate his claim in New York, he probably could not afford an appeal. Therefore, the only alternative remedy was practically foreclosed to this petitioner.

The first *Bauman* guideline seems to indicate that any issue that can be brought on appeal cannot be reviewed by mandamus. However, the second guideline modifies this provision by allowing a petitioner to allege that he will be irremediably damaged unless a judicial error is immediately corrected. The *Varsic* court maintained that the *Bauman* guidelines should be "balanced." Proceeding in this manner, discretionary mandamus relief will not be limited, but rather, will be expanded. A strong showing that "the district court's order was erroneous as a matter of law,"[56] combined with the contradictory provisions of the first two guidelines, will usually tip the balance in favor of granting mandamus relief.

---

54. Guerra v. Board of Trustees, 567 F.2d 352 (9th Cir. 1977).
55. United States v. Sherman, 501 F.2d 1358 (9th Cir. 1978).
56. Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

The ultimate issue thus becomes whether extraordinary relief is available to correct discretionary errors only when the petitioner has no other theoretical remedy or when no other remedy is practical. Justice Wallace focused on the hardship which this venue change would place on Varsic as an individual. Granting that it is probable and unfortunate that Varsic might not be able to afford to try his claim in New York, it is surprising that the court was willing to modify such strong precedent to suit the needs of one individual. We must question whether the court would have been as benevolent if the petitioner had not been such a sympathetic figure. If this had been a claim by a corporation or an individual of considerable wealth, it seems very possible that the outcome might have been different. The balancing of the guidelines seems to provide a convenient method of manipulating the criteria for mandamus review based upon who is the petitioner. If the court is willing to allow such manipulation of the *Bauman* guidelines, then the guidelines are ineffective in limiting the scope of discretionary mandamus review.

*Judith A. Leichtnam**

III. OTHER DEVELOPMENTS IN FEDERAL PRACTICE AND PROCEDURE

In *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135 (9th Cir. 1979), the Ninth Circuit expanded the "common benefit exception" to the general rule against granting attorneys' fees absent a statute or a contract. Plaintiff, a director of defendant corporation, alleged that the planned merger between defendant and another corporation violated section 5 of the Securities Exchange Act of 1934, and that the proxy statement approved by the board of directors was false and misleading in violation of the Act. Before the case came to trial, and as a result of plaintiff's suit, the board of directors withdrew the proxy statement and postponed the meeting on the proposed merger. The case was dismissed as moot, and plaintiff refiled a request for attorneys' fees.

---

* Second Year Student, Golden Gate University School of Law.

The court of appeals based its ruling that the grant of attorneys' fees was not impermissible as a matter of law on the "common benefit" exception to the general rule against the grant of attorneys' fees. This exception permits the grant of attorneys' fees when the plaintiff's actions have resulted in a substantial benefit to others. Relying on *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939), in which the Court stated that the formalities of a trial are not required for the grant of attorneys' fees, and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which held that attorneys' fees could be awarded even when the benefit conferred by the plaintiff is non-monetary, the court of appeals held that the facts that the case did not proceed to trial and that the suit was a private action rather than a shareholder's derivative suit or representative suit did not preclude the grant of attorneys' fees as a matter of law. The court stated that because plaintiff's action resulted in substantial benefits to the other shareholders, an easily identifiable group, an award of attorneys' fees against the corporation would shift the expense of the action to the shareholders and thereby prevent their unjust enrichment. The court reasoned that allowing attorneys' fees only if a suit was brought representatively or derivatively would defeat fundamental, equitable principles, and that the deciding factor is whether plaintiff has actually conferred a benefit on others.

The court also held that the fact that the underlying action had become moot did not preclude the grant of attorneys' fees. The court relied on *Schmidt v. Zazzara,* 544 F.2s 412 (9th Cir. 1976), which held that a court retains jurisdiction over the question of whether to grant attorneys' fees after the court has entered a final judgment on the underlying suit.

In *Campbell Industries v. M/V Gemini,* 619 F.2d 24 (9th Cir. 1980) plaintiff retained Torbert as an expert witness in a civil suit. Before trial, defense counsel had several ex parte meetings with Torbert, and Torbert later agreed to testify on behalf of defendant. Defendant moved to take Torbert's deposition, and the district court denied this motion. The district court also issued an order prohibiting Torbert from testifying at trial.

Although defendant conceded that it's counsel meetings with Torbert constituted a violation of Federal Rule of Civil Procedure 26(b)(4), the defendant argued that the district court abused its discretion in prohibiting Torbert from testifying. The court of appeals upheld the district court.

The court of appeals based its decision on the facts that defense counsel's conduct was a flagrant violation of proper discovery procedure, and that prohibiting Tortbert from testifying did not prejudice the defendant. The court noted that defendant had other expert witnesses available, and that at least one other expert did testify to the issues that Torbert would have covered. The court emphasized that district courts have broad discretion in making discovery rulings and have the inherent power to prevent abuses of discovery.

In *Moittie v. Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980), several private parties filed antitrust actions against defendant. Plaintiffs' suits against defendant were then consolidated with several other actions, and removed to federal court. The district court dismissed the suit, in which plaintiffs alleged that defendant had violated section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), on the ground that private parties do not have standing to sue under that section of the Act. Five of the seven plaintiffs appealed that suit, and, while their suit was pending, the Supreme Court held that private parties do have standing to sue under section 4. *Reiter v. Sonotone*, 442 U.S. 338 (1979). The five appeals from the earlier suit were remanded for holdings consistent with *Reiter*.

The plaintiffs in the present case are those two individuals who did not appeal the earlier district court decision. Instead, they brought suit in state court alleging state antitrust law violations. The suits were removed to federal court and were held to be disguised federal antitrust claims similar to the original federal claims. The later cases were then dismissed on res judicata grounds. Finding that the earlier case had been "effectively reversed," the court of appeals held that the present suit should not be dismissed on res judicata grounds.

The court noted that when a case is reversed on appeal, only the reversal controls subsequent cases as res judicata. Thus, had the plaintiffs chosen to appeal the earlier suit in federal court, that decision would have been reversed as to the plaintiffs. However, because they had not appealed, the case had never been reversed as to them. The court of appeals rejected what might be a technically correct result in favor of "common sense and simple justice." The court noted that even though the first case had not been reversed as to the plaintiffs in the present case, it had been reversed in fact. The court also pointed

out that the district court had not reached a judgment on the merits, but had merely ruled that all the plaintiffs below lacked standing to sue under section 4 of the Clayton Act. The court ruled that "a hypertechnical application of a judicially created rule" should not deny the plaintiffs their day in court.

In *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), plaintiff brought suit alleging securities law violations. Plaintiff moved for class certification, and when that motion was denied, plaintiff filed an affidavit stating that he could not proceed to trial because the possible award would be less than the cost of pursuing his claim. Plaintiff failed to appear when the case was called for trial, and the court ordered the case dismissed for want of prosecution. Three days later, the court filed a written order dismissing the suit without prejudice. Plaintiff then filed a notice of appeal, and defendant filed for a correction of the motion. In a second written order, the court decreed that the case was dismissed with prejudice.

The court of appeals characterized the lower court's second written order as a correction of a clerical mistake persuant to Federal Rule of Civil Procedure 60(a). Federal Rule of Civil Procedure 41(b) states that such a dismissal made without qualification is a dismissal with prejudice. Thus, in issuing its second written order, the lower court was merely correcting its first written order to conform to the initial verbal order. The court noted, however, that the district court had failed to seek permission to correct its first written order as required by rule 60(a). Analogizing the case to those in which a district court clearly intends to dismiss a petition but fails to do so—in which case a remand for the purpose of entering an order of dismissal would be a mere formality—the court held that the case had been dismissed with prejudice.

In *Myers v. United States District Court* 624 F.2d 906 (9th Cir. 1980) the court of appeals held that an untimely demand for a jury trial granted as a discretionary matter was "in accordance with state law" as required by rule 81(c). Plaintiff sued in state court, and defendant made an untimely demand for a jury trial. The state court granted the jury trial as a matter of discretion. The case was later removed to federal court, and in the order setting a trial date in federal district court, the judge specified that the trial would be had without a jury. Defense counsel sent

the district judge a letter asking if the jury had been eliminated as an oversight. The judge's clerk responded with a letter stating that defense counsel's letter would be treated as a jury demand which would be granted "as a matter of course." Plaintiff attacked defendant's right to a jury and the district judge issued a pretrial order that the trial would be had without a jury. Defendant petitioned the court of appeals for a writ of mandamus.

The court of appeals held that although defendant's demand for a jury was not made in the preferred way of making a demand within the ten-day limit prescribed by state law, defendant did seek a jury trial "in accordance with state law," FED. R. CIV. P. 81(c), by presenting the state court with evidence persuading it that the jury demand should be granted as a matter of discretion. The court held that the grant of the jury trial under state procedural rules was not reviewable, and a failure to make a timely demand for a jury trial in the district court did not constitute a waiver of his right to a jury trial.

In *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979), a derivative action was brought by two minority shareholders of Walt Disney Productions against certain members of the board of directors. The plaintiffs alleged that the organization of a stock option plan for key employees was conducted by illegal use of inside information by directors to maximize their individual profits, and by inadequate disclosure to shareholders of the federal laws applicable to the option plan. The specific violations alleged were Section 10b, Section 10b-5, and Section 14(a) of the Securities Exchange Act of 1934. Immediately after the suit was filed, Disney's board of directors appointed a "special litigation committee," composed of three directors, to determine if pursuit of the derivative action was in the best interests of the corporation. After a series of meetings, the special committee decided that the corporate interest would be best served if the action were discontinued, and moved for dismissal. The district court reasoned that if the special committee utilized its best business judgment, then neither the shareholders nor the courts could disturb that decision. Thus, the defendants' motion for summary judgment was partially granted, and only the issue of whether the special committee used good faith in its decision was left for litigation.

The minority shareholders appealed and argued that the board of directors could not unilaterally bar shareholder attempts to act on behalf of the corporation. Before the case

reached the Ninth Circuit Court, the United States Supreme Court addressed the identical issue in *Burks v. Lasker*, 441 U.S. 471 (1979). In that case, it was held that a special committee of disinterested directors can discontinue derivative actions if (1) the applicable state law allows it and (2) the state law is consistent with the federal securities laws. This two-step approach was followed by the Ninth Circuit in the derivative action against Disney Productions.

Since the California Supreme Court had never addressed this issue, the Ninth Circuit was forced to rely on rulings from intermediate appellate courts and other jurisdictions in its interpretation of California law. The court began by focusing on the business judgment rule as the standard by which directors are able to insulate their activities from shareholder attach. Since the business judgment rule provides immunity for all discretionary decisions by the directors, the Ninth Circuit reasoned that a decision by a special litigation committee not to pursue a cause of action clearly is within the ambit of this immunity. The crucial authority in support of this finding was a recent Eighth Circuit decision based on a "business judgment" statute similar to California's. In *Abbey v. Control Data Corp.*, 603 F.2d 724, (8th Cir. 1979), the extension of the business judgment rule to decisions by special litigation committee was recognized. The court reasoned that the board of directors must act on behalf of the corporation, and appointing a special litigation committee is part of that duty. The Ninth Circuit considered its holding to "reflect a clear trend in corporate law, and . . . that a California court would follow this trend." By so holding, the court believed that the board of directors could effectively control excessive and frivolous claims by dissident shareholders. Conversely, by requiring the special litigation committee to act in good faith in its decisions, the board of directors would not likely abuse this power to the detriment of the shareholders.

The second determination required by the *Burks* decision was an assurance that the interpretation of the state law does not conflict with the federal securities laws. The court held that allowing a special litigation committee appointed by the board of directors to dismiss a lawsuit brought against the corporation would not frustrate any policies underlying the federal securities laws. The court noted that protecting the purity of the securities market (section 10) and the prevention of deceptive proxy solicitations (section 14) were the relevant underlying policies in this

action. Neither of these policies was found to be frustrated by the court's holding in favor of summary judgment.

In short, the issue turns on the element of good faith. If the dismissal is made in bad faith, the shareholders will still be allowed to maintain their derivative action. That issue was reserved for trial. The two minority shareholders may prevail because one director on the special litigation committee was also a defendant in the derivative action.

In *De Luz Ranchos Investment v. Coldwell Banker & Co.*, 608 F.2d 1297 (9th Cir. 1979), the plaintiffs, De Luz, were a group of limited partnerships formed to facilitate investment in a 97,500-acre parcel of land owned by Kaiser-Aetna (Kaiser). The parcel was subdivided into separate tracts, and the plaintiffs purchased lots from Kaiser within two of those tracts. There were two important factors involved in this sales transaction: 1) the plaintiffs were charged a price in excess of the market value, and 2) Kaiser represented to the buyers that it would develop common facilities within the planned community. Based upon these factors, De Luz charged Kaiser, its representatives, and Coldwell Banker with fraud, misrepresentation, and deceptive practices, in violation of the federal securities laws and the Interstate Land Sales Full Disclosure Act. The district court granted Coldwell's motion for summary judgment on the basis of the defendants' failure to state a claim. It was held that a land sale contract is not subject to the federal securities laws, and that the size of the subdivision qualified it as an exemption from the provisions of the Land Sales Act. Both of these findings were appealed by De Luz.

On the applicability of the federal securities laws to a land sale contract, the plaintiffs contended that their agreement with Kaiser was in fact an investment contract, and thereby satisfied the definition of a security under 15 U.S.C. section 78c(10). The court began its analysis by noting that an investment contract is generally defined as an agreement to invest money in a common enterprise with an expectation of profits solely from the efforts of others. The Ninth Circuit in *Securities and Exchange Commission v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), modified this test by limiting the "efforts" of others to only the essential managerial efforts which affect the failure or success of the enterprise. De Luz argued that this standard was met because Kaiser promoted the entire development as a passive investment designed to appreciate in value, and because

Kaiser indicated that it would facilitate any resale efforts. The appellate court held that the evidence failed to establish an investment agreement between the parties in light of the additional factors. Specifically, Kaiser never contractually bound itself to develop any land in the development, and De Luz maintained the sole control to develop their purchased land. Furthermore, the parties never extended an agreement to distribute profits from the development. The court reasoned that Kaiser did not provide the "essential managerial efforts" in developing the property purchased by De Luz, and that the evidence strongly disproved a common enterprise between De Luz and Kaiser. While the court admitted that the agreement "lies near the fringe of those transactions" that are investment contracts, summary judgment was affirmed.

De Luz also appealed the district court finding that the transaction was exempt from the provisions of the Interstate Land Sale Full Disclosure Act. The Act exempts "the sale or lease of lots in a subdivision, all of which are five acres or more in size." The first dispute arose over the proper definition of a subdivision. The defendants claimed that each tract within the 97,500 acre parcel was a subdivision, and because all the lots within that tract were larger than five acres, the agreement was exempt. De Luz argued that the subdivision was the entire parcel, in which some lots are less than five acres in size. The court found the relevant subdivision to be the entire development. The second dispute arose over whether the exemption for a parcel that contains lots "all of which are five acres or more in size" applies to the entire subdivision or merely the parcel conveyed. If the latter applied, the transaction would be exempt. The court reasoned that the Act was designed to prevent fraud in land sales, and should therefore be liberally construed. The court held that the Act applies to the entire subdivision. The district court's grant of summary judgment was reversed.

In *Securities and Exchange Commission v. Blazon Corp.*, 609 F.2d 960 (9th Cir. 1979), the defendants, Glenn McMurray and Arthur Lloyd, organized the Blazon Corporation in 1972 for the purpose of acquiring land for residential development and construction. After the initial sixteen acre land purchase exhausted the corporate finances, a public stock offering was organized. The sale of Blazon stock proceeded under the small issues exemption provided for in section 3(b) of the Securities Act and Regulation A promulgated thereunder. Four hundred thou-

sand shares of common stock were offered at $1.00 per share. Pursuant to the small issues exemption the defendants filed a notification form with the Commission and prepared an offering circular. The circular indicated that Blazon 1) owned the sixteen acre tract, 2) intended to purchase an additional twenty-three acres with the proceeds from the offering, and 3) planned to allocate $230,000 of the offering proceeds to development of the sixteen acre plot.

During the offering period, Blazon engaged in other tranactions that rendered compliance with the objectives in the notice circular impossible. Specifically, Blazon purchased a trailer manufacturing factory and secured a loan by forfeiting the rights to receive 336,500 shares of Blazon stock. Also, Blazon loaned $225,000 out of the proceeds of the stock offering to another corporation. Finally, the defendants borrowed $50,000 in order to purchase Blazon stock, and pledged a $50,000 certificate of deposit purchased by Blazon with offering proceeds as collateral for the loan. None of these changes were communicated to the Commission, and suit was filed alleging registration and offering violations of the federal securities laws. On the registration count, summary judgment was granted in favor of Blazon. On the offering violation, summary judgment was granted in favor of the Commission for Blazon's violation of the antifraud provisions. Both the Commission and the defendants appealed.

Blazon appealed the fraud count on the grounds that a finding of fraudulent intent was required to establish a violation of the antifraud provisions, and that no showing was made before the district court. Blazon relied on *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) as authority that a showing of fraudulent intent is needed. However, the court distinguished that case on two grounds. First, *Ernst & Ernst* involved only section 10b and Rule 10b-5 violations, whereas section 17 was alleged as an additional violation against Blazon. The court recognized that fraudulent intent must be shown to bring a section 10 violation, but held that a similar showing is not required under section 17. Second, the *Ernst & Ernst* suit was brought by private parties for damages, whereas the suit against Blazon was brought for injunctive relief. The court found these differences to be significant. The court did not require a finding of scienter in an injunction case under sections 17(a)(2) and (3).

The Commission appealed on the grounds that Blazon was not exempt from registering their securities. The Commission

argued that although the defendants were exempt from registration under section 3(b) and complied with Regulation A at the beginning of their sale, the exemption was lost when the Notification to the Commission and the offering circular subsequently became false and misleading. According to the Commission's argument, this led to a violation of the Regulation A requirement to qualify for section 3(b) exemption. The result, the Commission contended, was a violation of section 5 of the Securities Act (prohibiting the sale of unregistered securities) because the nonexempt securities were not otherwise registered. The court analyzed this argument by distinguishing situations in which the notification and offering circular are never filed, from those situations in which the required documents are filed incorrectly. The court noted that when the documents are never filed, the result is an automatic loss of the registration exemption and thereby a section 5 violation. However, the court refused to extend this to an "incomplete or inadequate filing, or filing which becomes incomplete or inadequate." This holding was based on rule 261, 17 C.F.R. 230.261 (1980). The provisions of this section grant the Commission the option to suspend an exemption if after proper filing, the Commission has reason to believe the notification or offering circular contain untrue statements. The court reasoned that if Blazon's exemption were automatically terminated because it became inadequate, then the purpose of rule 261 would be entirely frustrated.

The final argument by the Commission concerned the content of the injunction entered by the district court. The injunction allowed the defendants to move for dissolution of the injunction at any time after eighteen months of its issuance. The Commission argued that the provision in the injunction was beyond the power of the court to include and that it was an abuse of discretion to include it. The appellate court dispensed with this argument rather easily. The court relied on well recognized authority that affords a district court wide discretion in framing its injunction. Furthermore, the test for overuling a lower court injunction is whether there was a plain abuse of discretion, and the evidence did not satisfy that standard.

In *Securities and Exchange Commission v. Murphy*, 626 F.2d 1363 (9th Cir. 1980), the defendant, Stephen Murphy, appealed a district court ruling that granted summary judgment against him and the Intertie Company for violating the registration and antifraud provisions of the federal securities laws.

Additionally, the defendant appealled the scope of the court's injunction prohibiting future violations.

In 1971, Murphy formed the Intertie Company for the purpose of promoting and selling cable vision systems to partnerships. The scheme involved the sale of cable vision systems by Intertie for cash, nonrecourse promissory notes, and an immediate leaseback by the buyer to Intertie. Murphy employed the International Securities Corporation to sell the partnership interests, but the interests were never registered as securities. Murphy's attempt to rely on the private offering exemption of the securities laws was rejected by the district court, which found that the sale was a public offering because the number of offerees was not limited or controlled in any way. Thus, the transaction was subject to registration under section 5 of the Securities Act. The antifraud provisions (sections 17 and 10 and rule 10b-5) were found to be violated because the offering memoranda contained misleading information about the history, performance capability, and financial structure of the Intertie Company.

Registration Violations. On appeal, Murphy argued the registration laws were inapplicable because the sale of the shares in the limited partnership were not securities, and in the alternative, because the transaction was protected by the private offering exemption. The appellate court ruled against Murphy on both contentions.

The court relied on *Securities and Exchange Commission v. Glenn W. Turner,* 474 F.2d 476 (9th Cir. 1973) for its definition of a security as an investment in a common enterprise with the essential managerial efforts coming from persons other than the investor. Since the investors had no managerial role in the Intertie Company, the limited partnership interests qualified as securities.

A more involved argument by Murphy was that the transaction should be construed as a private offering. The availability of this exemption mainly depends on the relationship between the offeree and the issuer of the securities. This case was unique in that the identity of the issuer was not apparant. Generally, the issuer of a partnership share is the partnership itself. This would indicate that the newly formed partnerships were the issuers, and not Murphy and the Intertie Company. However, the court reasoned that the issuer of securities should be the entity that 1) is responsible for the success or failure of the enterprise, and 2)

is material to the investors' decision. The evidence showed that Intertie participated extensively in the partnership offering plan, managed many of the partnerships, and depended on new capital to meet its obligations on the previous purchases. Thus, the court found Intertie to be the issuer because of this involvement in the transaction.

After identifying the issuer, Murphy next argued the private offering exemption under section 4(2) of the Securities Act. The factors involved in this determination are: 1) the number of offerees, 2) the sophistication of the offerees, 3) the size and manner of the offering, and 4) the relationship of the offerees to the issuer. These factors balanced in favor of a public offering. For example, the SEC introduced evidence tending to show that the offering was made available to a large number of investors. This was indicative of a nonprivate sale especially when the defendant was unable to introduce evidence to the contrary. Also, it was found that a majority of the offerees "lacked the sort of business acumen necessary to qualify as sophisticated investors." Murphy was unable to dispute this point. Additionally, the court found the aggregate sale of $7.5 million in securities to be a sizeable offering. Finally, the court found that the relationship between the parties was such that the investors were not provided with the necessary information needed to make their investment decisions. Since the investors composed a group that the securities laws were designed to protect, Murphy could not successfully claim a section 4(2) exemption.

Murphy also claimed an exemption under rule 146 of the Code of Federal Regulations, which provides an exemption when the issuer has reasonable grounds to believe that the offeree realized the nature of the investment or is able to bear the economic risk. The court found that the factors which supported a public offering under section 4(2) were applicable in this analysis. Therefore, Murphy had no reasonable grounds to believe that the offerees possessed sufficient information without registration.

The final issue for the court was to review Murphy's role in the transaction, which must have been significant if he were held personally liable under the registration provisions. Although a literal reading of section 5 limits the liability to persons who sell or offer to sell a security, other participants have also been found to be subject to registration. Participant liability has generally been found if the defendant's conduct proximately caused

the harm to the plaintiff, or if "but for" the defendant's involvement the transaction would not have taken place. Since Murphy engaged in steps necessary to the distribution, devised the corporate financing scheme without which there would have been no limited partnerships, prepared the offering memoranda, met with broker-dealers, and spoke at broler-dealer seminars, he easily satisfied the standard for participant liability. The holding by the district court, that Murphy violated the registration provisions of the Securities Act by offering and selling unregistered securities, was affirmed.

Violations of the Antifraud Provisions. Murphy contended that the district court erred in finding him liable for securities fraud because his omissions were not material and because he did not act with scienter. The court rejected the materiality argument because Murphy neglected to disclose the financial condition, solvency, and profitability of Intertie. The court found "a reasonable investor would consider this omitted information important in making an investment decision." Murphy's scienter argument focused on the recent decision in *Securities and Exchange Commission v. Aaron*, 100 S. Ct. 1945 (1980), which held that the SEC could not obtain an injunction for violations of section 10(b), rule 10b-5, or section 17(a)(1) absent proof of scienter. Murphy's argument was rejected because the issue proceeded to trial at the district court, and it was found that Murphy "willfully" and "knowingly" obtained money through material misrepresentations. The use of the terms by the district court indicated that scienter was found. Additionally, the evidence showed that Murphy also violated section 17(a)(2) (obtaining money or property by means of an untrue statement of a material fact or by omission of a material fact). The court in *Aaron* held that an injunction under this section may be issued absent proof of scienter.

Permanent Injunction Against Registration Violations. Murphy claimed that the trial court improperly granted a permanent injunction against future violations of the registration requirements, and that the breadth of the injunction was an abuse of discretion. The standard to be met to obtain a permanent injunction is a showing that there is a reasonable likelihood of future violations of the securities laws. This is done by assessing the totality of the circumstances surrounding the defendant and his violations. Murphy contended that his assurances against future violations should satisfy the test. The appellate

court disagreed. The facts of the case indicated that Murphy acted recklessly in violating the registration provisions, and this supported a permanent injunction.

A provision of the injunction required that Murphy furnish copies of the court's decree to future associates. Murphy argued that this order was punitive in nature. The court relied on well recognized authority that allows any injunction if the standards of the public interest are served, and held that investors' awareness of matters affecting their investment which came to light in the litigation is undoubtedly within the public interest.